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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	No. CR 07-00721-MAG
)	
Plaintiff,)	UNITED STATES' OPPOSITION TO
)	DEFENDANT'S MOTION TO COMPEL
v.)	DISCLOSURE OF VICTIM'S IDENTITY
)	AND PERSONAL IDENTIFYING
ANDREW MAKER,)	INFORMATION
)	
Defendant.)	Hearing Date: March 4, 2008
)	Time: 10:30 A.M.
)	Judge: Hon. Elizabeth D. Laporte

I. INTRODUCTION

The United States hereby submits its opposition to defendant Andrew Maker's ("Defendant") motion to compel disclosure of the identity and personal identifying information of the victim in this case. Contrary to Defendant's contention that he is entitled to disclosure of this information, the United States is not obligated to turn over such information at this time.

II. STATEMENT OF FACTS

On September 30, 2007, a security guard ("Victim") was working the disabled access gate for a special event held at Fort Mason. Defendant approached the gate in an attempt to gain entry. Victim told Defendant that the main entrance to the event was on the opposite side of the park. Defendant told Victim that he was handicapped and Victim asked defendant whether he

1 had a blue handicap placard. Defendant became agitated and accused Victim of harassing him,
 2 to which Victim responded she was only doing her job. Defendant handed Victim the ticket and
 3 began pushing the gate open. As Victim was unable to verify whether Defendant was supposed
 4 to enter through the disabled access gate, she returned Defendant's ticket to him and told him to
 5 enter through the main entrance gate. As she attempted to close the disabled access gate,
 6 Defendant shoved the gate into Victim's torso, calling her names like "bitch" and "hoe", spat in
 7 the Victim's face and then walked away cursing.

8 After Defendant was stopped by security per Victim's request, Victim positively
 9 identified Defendant as the person who assaulted her. In response, Defendant accused the police
 10 officers of "taking the white bitch's side and trying to keep the black people down." After being
 11 initially uncooperative and making accusations towards the officers, Defendant subsequently
 12 admitted that he had an altercation with Victim.

13 III. ARGUMENT

14 A. DEFENDANT IS NOT ENTITLED TO DISCLOSURE OF THE IDENTITY AND 15 PERSONAL IDENTIFYING INFORMATION OF THE VICTIM.

16 1. THE DEFENSE HAS NOT MADE A SHOWING UNDER RULE 16 THAT 17 DEFENDANT NEEDS THE INFORMATION.

18 *United States v. Richter* sets forth the Ninth Circuit's position on providing the identities
 19 of government witnesses. *United States v. Richter*, 488 F.2d 170 (9th Cir. 1973). If a defendant
 20 desires discretionary disclosure of the government's witnesses, he should make the showing
 21 similar to that required by rule 16(b). If the court wishes to entertain the motion and if the
 22 government feels that it has a valid reason for resisting that discovery, it should move for a
 23 protective order similar to that provided for under rule 16(e). This ensures that there is an
 24 adequate basis for requesting such discovery and will afford the government a known method for
 25 resisting the request. It is incumbent on the district court to consider the government interests
 26 asserted in light of the materiality shown and without a factual showing there is no basis upon
 27 which the court may exercise its discretion, and for it to ignore the requirement is to abuse its
 28 discretion. *United States v. Mandel*, 914 F.2d 1215 (9th Cir. 1990); *see also United States v.*
Cadet, 727 F.2d 1453 (9th Cir. 1984); *United States v. Payseur*, 501 F.2d 966 (9th Cir. 1974);

1 *United States v. Spagnuolo*, 515 F.2d 818 (9th Cir. 1975).

2 Here, defendant's motion has made no factual showing to justify the disclosure and for
3 that reason alone defendant's motion may be denied. Under Federal Rule of Criminal Procedure
4 16, there is no provision for disclosing names or address of government witnesses. Furthermore,
5 "defendant bears the burden of demonstrating a need for disclosure of a confidential informant's
6 identity. He must show that he has more than a 'mere suspicion' that the informant has
7 information which will prove 'relevant and helpful' or will be essential to a fair trial." *United*
8 *States v. Amador-Galvan*, 9 F.3d 1414, 1417 (9th Cir. 1993).

9 While the United States agrees that a defendant is entitled to materials relevant to his or
10 her case, the disclosure of Victim's identity is not warranted here. Defendant relies on *Rovario*
11 *v. United States* in arguing that he is entitled to disclosure of Victim's name, Victim's
12 whereabouts, and Victim's communications with the government. *Rovario v. United States*, 353
13 U.S. 53 (1957). Defendant has failed to point out *Rovario* involved the identities of a
14 confidential informant, not a crime victim, and the *Rovario* court also clearly stated "no fixed
15 ruled with respect to disclosure is justifiable. The problem is one that calls for balancing the
16 public interest in protecting the flow of information against the individual's right to prepare his
17 defense." *Id.* at 62.

18 Defendant's reliance on *Rovario* in claiming he is entitled to disclosure is misplaced. In
19 addition to the *Rovario* court stating that the rule regarding disclosure is not fixed, Defendant is
20 not situated similarly enough to the facts in *Rovario* that would render the *Rovario* holding
21 absolute. In *Rovario*, Defendant made clear that disclosure of the confidential informant's
22 identity would be used to confirm or contact government witnesses that were material to the
23 case. Here, Defendant has only cited inquiries regarding the Victim's bias and credibility rather
24 than more articulable reasons. While the Defendant has a right to a fair trial, this right must be
25 weighed against the Victim's safety.

26 In *United States v. Jordan*, the Court held that denial of a motion to compel disclosure is
27 proper if the defense attorney is told of the substance of the witness' direct examination
28 testimony ahead of time, even if in an informal manner. *United States v. Jordan*, 466 F.2d 99,

1 101 (4th Cir. 1972), *cert. den.* 409 U.S. 1129 (1973). This is also consistent with the Jencks Act.
2 18 U.S.C. § 3500. In *Jordan*, the defense counsel met informally with the United States
3 Attorney prosecuting the case. During that meeting, the defense attorney was informed of the
4 substance of the testimony which the two eyewitnesses to the attack would provide on direct
5 examination. The United States Attorney, however, refused to disclose their identities. In ruling
6 on the Defendant's motion to compel disclosure of the eyewitnesses, the Court of Appeals held
7 that the motion was properly denied.

8 In the instant case, defense counsel has been provided with a copy of the Victim's written
9 statement in which she provides a comprehensive account of the incident on September 30,
10 2007. Having received the Victim's statement, Defendant is aware of the substance of her
11 testimony and disclosure of her identity is not necessary under these circumstances.

12 **2. THE GOVERNMENT HAS A HEIGHTENED DUTY TO PROTECT THE**
13 **VICTIM IN THIS CASE AND THE FACTS OF THIS CASE DO NOT**
14 **WEIGH IN FAVOR OF DISCLOSURE.**

15 In *United States v. Price*, the Court described numerous factors helpful to exercising
16 judicial discretion in determining whether the government should be ordered to turn over the
17 identity of its witnesses. *United States v. Price*, 448 F. Supp. 503 (D. Colo 1978). There, in
18 support of defendant's motion for disclosure of government's witnesses, defendant set forth that:
19 (1) the offense alleged did not involve a crime of violence; (2) the defendant had no prior
20 criminal history and no history of violence; (3) the bulk of evidence related to testimony about
21 documents which, by their nature, are not easily altered; (4) supplying the witnesses names prior
22 to trial would not increase the likelihood that the government's witnesses would fail to appear or
23 refuse to testify at trial; (5) the case was complex and difficult; and (6) the defendant did not
24 have the funds with which to investigate and prepare his defense. *Price*, at 505.

25 The government has examined the same factors in the instant case and believes they
26 support the government's position that disclosure of the Victim's identity is not warranted: (1)
27 the crime charged in this case is a crime of violence; (2) the defendant has prior convictions for
28 battery and carrying a concealed weapon; (3) the defendant has already been provided with a

Victim statement which summarizes her testimony; (4) defendant's communications with the Victim could result in her refusing to testify; (5) this is a relatively simple and straightforward case; (6) the defendant is represented by the Federal Public Defender's Office, which is comprised of highly qualified attorneys and seasoned investigators.

Given that the crime charged in this case involves violence, the United States has a heightened duty to protect the Victim by withholding her identity. On the day of the incident, she was an employee who was merely trying to do her job. The government's obligation to protect the Victim is paramount.

B. DEFENDANT IS NOT ENTITLED TO OTHER MATERIAL INFORMATION REGARDING THE VICTIM.

With respect to "other material" information referred to by defense counsel, the United States is unable to address this issue in the absence of Defendant's articulation of what is considered material information. Here, the United States object to turning over the following information:

1. Victim's name
2. Victim's address
3. Victim's phone number
4. Victim's date of birth
5. Victim's social security number

IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court deny Defendant's Motion to Compel Disclosure of the Victim's Identity. In the alternative, the government requests that this Court order the disclosure of the information subject to an appropriate protective order.

Respectfully submitted,

DATED: 2/12/08

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/s/
WENDY THOMAS
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